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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY 11 1992

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Amendment of Rules Governing) CC Docket No. 92-26
Procedures To Be Followed When)
Formal Complaints Are Filed)
Against Common Carriers)

REPLY COMMENTS OF UNITED VIDEO, INC.,
SUPERSTAR CONNECTION, SOUTHERN
SATELLITE SYSTEMS, INC., NETLINK USA
AND EMI COMMUNICATIONS CORP.

United Video, Inc., Superstar Connection, Southern Satellite Systems, Inc., Netlink USA and EMI Communications Corp. (collectively, "Joint Commenters"), by their attorneys, submit these Reply Comments in response to selected comments filed in this proceeding. Contrary to its stated goal of facilitating "timelier resolution of formal complaints," the Commission would "prolong rather than expedite resolution" of complaint proceedings by requiring substantive motions to be filed with the answer and by expanding the scope of self-executing discovery beyond the thirty interrogatories currently permitted. Notice of Proposed Rulemaking, FCC 92-58, released March 12, 1992 ("Notice") at ¶1.

Several parties advocated expansion of the discovery process to provide for self-executing document requests, requests for admission and/or depositions. See, e.g., Comments of Sprint Communications Company, L.P. at 5 (self-executing document production); Comments of Williams

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Telecommunications Group at 3 (self-executing requests for admission); Comments of North American Telecommunications Association at 6-7 (self-executing document production and depositions). These proposals will only multiply "the protracted disputes over discovery issues" which the Commission seeks to minimize. Notice at ¶1.

The Commission's current rule, which permits only thirty initial interrogatories, imposes discipline on the discovery process by forcing the parties to focus initial discovery on critical issues and to justify the need for any additional discovery. Without this discipline, parties will initiate wide-ranging discovery which ultimately will be anything but "self-executing," inevitably resulting in more disputes which the Commission will be forced to resolve when confronted with motions to compel.¹ Active Commission involvement is essential to control the discovery process, and that

¹ These proposals would be even more troublesome if the Commission eliminated relevance objections by deeming any such objection an admission as proposed in the Notice at ¶15. However, the Comments were virtually unanimous in opposing this proposal. See, e.g., Comments of Federal Communications Bar Association at 10-12 (proposal "would only further pervert the purpose of the discovery process"); Comments of the North American Telecommunications Association at 9-10 (proposal is "unfair and unreasonable" and "would be a waste of the Commission's and the parties' resources"); Comments of GTE Telephone companies at 3-4 (proposal "would invite 'fishing expeditions' and other abuses"); but see Comments of Continental Mobile Telephone Company at 3 (proposal "is a significant positive step" which "place[s] a deserved burden on uncooperative parties").

involvement should begin before discovery is commenced² rather than after the parties have embarked on several different discovery routes.

In a similar vein, Allnet Communications Services, Inc. proposed that the Commission require a party to attach copies of any document cited in its pleadings and prohibit that party from relying "upon a document it files at its own discretion later in the proceeding as support for an allegation, denial or assertion of fact previously set forth in its pleadings, except where good cause is shown as to why the party could not have failed [sic] produced such document as an attachment to its earlier filed pleading which initially set forth such allegation, denial, or assertion of fact." Comments of Allnet Communications Services, Inc. at Attachment A, ii. Allnet's proposal is simply unworkable. It places an undue burden on defendants to divine which documents will best support or refute a particular "allegation, denial or assertion of fact" within the limited time provided to

² In this respect, U.S. West's proposal for a preliminary scheduling conference similar to that under Fed. R. Civ. P. 16(b) may be helpful. See Comments of U.S. West at 12-14. Several other parties also suggested more active involvement by the Commission in policing the discovery process. See, e.g., Comments of the Federal Communications Bar Association at 13; Comments of Sprint Communications Company, L.P. at 7; Comments of MCI Telecommunications Corporation at 19-20.

prepare an answer (and, under the Commission's proposal, dispositive motions and motions for a more definite statement). Moreover, the Allnet proposal will result in more disputes, most of which will involve matters unrelated or only peripherally related to the real issues in the complaint proceeding, as parties argue over whether a particular document should have been attached to an earlier pleading.

The Federal Communications Bar Association supported the Commission's proposal to require "substantive motions and answers" to be "filed simultaneously"³ so that "the defendant's complete position [will be] before the Commission at one time." Comments of the Federal Communications Bar Association at 6-7.⁴ While substantive motions at this stage of the proceedings might "sharpen the issues for resolution and expedite the process" in some cases (Id. at 7), the Commission should not prohibit the filing of summary judgment or other

³ The vast majority of commenters opposed the Commission's proposal to shorten the time to file an answer from thirty to twenty days. See, e.g., Comments of the Federal Communications Bar Association at 3; Comments of Sprint Communications Company, L.P. at 3; Comments of MCI Telecommunications Corporation at 7; Comments of Central Telephone Company at 2; Comments of GTE Telephone Companies at 2; Comments of NYNEX Telephone Companies at 3; but see Comments of Williams Telecommunications Group, Inc. at 1; Comments of AT&T at 3.

⁴ The only exception under the FCBA proposal would be for motions for a more definite statement, which FCBA would require to be filed "within a short period of time after the complaint is served." Id. at 8.

dispositive motions at later stages. Issues may not become ripe for summary judgment until after discovery has concluded. Comments of Pacific Bell and Nevada Bell at 1-2 ("a better rule would be to require a summary judgment motion be filed anytime before the expiration of thirty days after answers to interrogatories" or later if based "on information discovered after that date"). Because a motion for summary judgment filed after discovery "can assist in focusing the parties" and can "provide an efficient vehicle for resolution" of some or all issues, the Commission should encourage such motions rather than limit them. Comments of MCI Telecommunications Corporation at 9-10; Comments of GTE Telephone Companies at 2-3.

Bellsouth Corporation and the Federal Communications Bar Association question the benefit and viability of bifurcating proceedings into liability and damage phases. Comments of BellSouth at 4; Comments of FCBA at 9. BellSouth asserts that the separation of discovery issues related to these phases is not feasible as the factual issues related to both phases will allegedly overlap. Id. The Joint Commenters disagree. As explained in their comments, several of the Joint Commenters have direct experience with bifurcation on an even narrower level than simply "liability," and bifurcation proved successful in expediting the proceeding. See Comments of United Video, Inc., et al. at 11-13. Bifurcation of funda-

mental legal issues, including but not limited to liability, may render moot aspects of a proceeding which could require extensive discovery and unnecessarily waste the parties' and the Commission's resources.

Finally, Williams Telecommunications Group, Inc. asked the Commission to "consider awarding attorneys' fees to successful complainants where the Commission deems it appropriate." Comments of Williams Telecommunications Group, Inc. at 4. The Joint Commenters support the award of attorneys' fees and costs when the Commission is forced to decide a motion to compel or when a party files frivolous or repetitive pleadings (see Comments of United Video, Inc., et al. at 14-18). However, this remedy should be available to any party rather than to complainants alone as Williams appears to suggest.

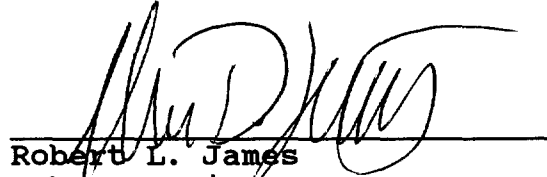
Conclusion

The Commission should not expand the scope of self-executing discovery and should preserve a party's right to file a motion for summary judgment on some or all of the issues in dispute at any time after an answer is filed. The Commission should endorse bifurcation, which has proven to be a valuable procedural tool for resolving basic legal issues. The award of attorneys' fees and costs is a remedy which should be available to either party when the opposing party

refuses to cooperate in discovery or files frivolous and/or repetitive motions.

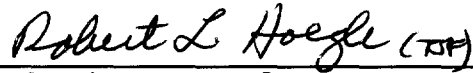
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Respectfully submitted,



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